

Susi Gellatly (Migration) [2023] AATA 3724 (25 October 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Widiyanti Susi Gellatly
CASE NUMBER:	1925651
HOME AFFAIRS REFERENCE(S):	BCC2018/907639
MEMBER:	Tegen Downes
DATE:	25 October 2023
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2) of Schedule 2 to the Regulations • cl 820. 221(1)(a) of Schedule 2 to the Regulations • reg 2.03A

Statement made on 25 October 2023 at 8:51am

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820– validly married — genuine and continuing relationship – parties see their relationship as a long-term commitment –social aspects of the relationship are consistent with a de facto and married relationship – couple had a mutual commitment to a shared life to the exclusion of all others – decision under review remitted

LEGISLATION

Migration Act 1958, ss, 5, 65

Migration Regulations 1994, r 2.03, Schedule 2, cls 820.211, 820.221

CASES

Ally v MIAC [2008] FCAFC 49

He v MIBP [2017] FCAFC 206
Jayasinghe v MIMA [2006] FCA 1700
MIEA v Poche (1980) 4 ALD 139

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under section 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 26 February 2018 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 820.211(2)(a) of Schedule 2 to the Regulations because the delegate considered that the evidence and information provided was not sufficient to demonstrate that the applicant was the 'de facto partner' of the sponsor.
4. The applicant appeared before the Tribunal on 24 October 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and the sponsor's brother.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

6. ISSUES AND LAW

7. This review application relates to an application for a provisional partner visa to enable the applicant to remain in Australia on a temporary basis.
8. The primary issues in this review application are whether, at the time the visa application was made, and at the time of this decision, the applicant was and is the 'spouse' or 'de facto partner' of an Australian permanent resident or Australian citizen, for the purpose of cl 820.211(2)(a) and cl 820.221 of Schedule 2 to the Regulations.
9. 'De facto partner' is defined in s 5CB of the Act, which provides that a person is in a 'de facto relationship' with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s 5CB(2).
10. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a 'married relationship'. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d).
11. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the parties' household and their commitment to each other, as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

12. In forming a view of the relationship at the time of application, the Tribunal must consider all relevant evidence, which may include evidence of events after the date of application insofar as it assists in the task of determining whether the visa applicant and the sponsor were in a partner relationship at the time of the application. Evidence of events after the visa application is relevant if it tends logically to show the existence or non-existence of facts relevant to the issue to be determined: *Ally v MIAC* [2008] FCAFC 49 at [32]–[35]; *Jayasinghe v MIMA* [2006] FCA 1700 at [35], citing *MIEA v Poche* (1980) 4 ALD 139.
13. If the primary issues are resolved in the applicant's favour, the secondary issues are whether, at the time of the visa application and at the time of this decision, the visa applicant satisfies the other requirements of cl 820.211 and cl 820.221 of Schedule 2 to the Regulations.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. Background

15. The applicant is a 32-year-old woman from Indonesia. At the time of application, she claims to have been in a de facto relationship with her sponsor, a 32-year-old former British citizen who became an Australian permanent resident in 2016 and an Australian citizen in 2021. At the time of decision, the couple claims to be in a married relationship.
16. The couple claim to have met in February 2015 in Hong Kong (where they were both living) through mutual friends. They claim to have commenced a relationship in May 2015 and moved in together in August 2015. They claim to have lived together in Hong Kong for approximately one year, before the sponsor returned to Australia to progress his citizenship.
17. The couple claim to have reunited in Australia approximately three months later in November 2016 after the applicant obtained a tourist visa. They then lived together in Australia with the sponsor's family and travelled with the sponsor's family to the United Kingdom for a holiday and to visit the sponsor's extended family. The applicant then returned to Indonesia in February 2017.
18. The couple claim that the sponsor visited the applicant in Indonesia for approximately one month in June 2017. The applicant then returned to Australia in January 2018 on a further tourist visa, which remained current at the time she applied for the visa that is the subject of this review application. The couple have continued to live in Australia since this time, aside from a joint trip to Indonesia in June 2018.
19. The couple had a child together in 2019, now four-years-old, and were married in 2021.
20. The couple presented as credible witnesses at the hearing. Their evidence appeared to be genuine and sincere. There is no evidence or information before me that would tend to undermine the couple's claims, or the reliability of the evidence provided. The couple's claims are also supported by appropriate documentary evidence. Accordingly, having carefully considered all of the oral and documentary evidence provided, including that not expressly referred to in this decision, I wholly accept the couple's claims as true.
21. I am satisfied that this is a matter where the applicant submitted limited documentary evidence to the department. There is much evidence before the Tribunal that was unavailable to the primary decision maker which, if it had been available, would likely have resulted in a different outcome at first instance.

Are the additional criteria for a de facto relationship met?

22. Persons claiming to be in a de facto relationship for a partner visa must meet the additional criteria in reg 2.03A.
23. First, both members of the couple must be at least 18 years old: reg 2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
24. Secondly, the couple must have been in the de facto relationship for at least the 12-month period ending immediately before the date of the application: reg 2.03A(3). While this requirement does not apply in limited circumstances, there is no evidence before me that any of the exceptions apply.
25. On balance, I am satisfied that the relationship meets this requirement. At the time of application, the couple had been in a relationship for almost three years. They had lived together for approximately 17 months collectively and had lived separately for approximately 13 months collectively because of their respective visa and citizenship constraints. Although temporarily physically separated, they maintained a genuine and continuing relationship.
26. For these reasons, I am satisfied that the applicant meets the additional criteria prescribed in reg 2.03A.

Are the parties validly married?

27. The couple submitted a marriage certificate issued by the Registry of Births, Deaths and Marriages in Queensland certifying that they were married on 24 May 2021 in Brisbane.
28. Accordingly, in the absence of any evidence to the contrary, I am satisfied that the couple are married to each other under a marriage that is valid for the purposes of the Act, as required by s 5F(2)(a).

Are the other requirements for a de facto / married relationship met?

Financial aspects of the relationship

29. The couple claim to have one joint asset, being a joint account with the Commonwealth Bank which was opened on 16 January 2017. The couple submitted evidence to support this claim, including correspondence from the Commonwealth Bank and annotated bank statements for the periods 31 December 2017 to 30 December 2018 and 31 December 2022 to 30 June 2023.
30. It is evident from the bank statements that: the applicant and the sponsor's wages have been deposited into the account; and the account has been used for ordinary living expenses such as rent, utilities, phone bills, day care and groceries.
31. Having regard to this evidence, I find that, at the material times, the couple have one joint asset, have pooled their financial resources and shared day-to-day household expenses in a manner consistent with a genuine relationship.
32. The couple do not claim to have any joint liabilities or to owe any legal obligations to the other party and I make findings accordingly.
33. I find that the financial aspects of the relationship are consistent with a de facto and married relationship, as defined in the Act.

Nature of the household

34. At the time of application, the couple claim to have lived together at the sponsor's family home in Cleveland. They then moved to Heron Island Resort, where they both briefly worked before returning to the sponsor's family home. They then lived together as a couple at an apartment in Capalaba between October 2018 and April 2023, and since April 2023 in Indooroopilly.
35. The couple gave oral evidence as to their living arrangements, their daily lives, the division of housework and how they look after their son. They also provided some documentary evidence to support their claims, including residential tenancy agreements and bank statements addressed to their shared addresses. They also provided written statements from family members and a friend that partially corroborate their claims.
36. While the volume of supporting evidence provided is not overwhelming, I accept the couple's oral evidence at face value, having regard to the supporting evidence provided. I find that, at the material times, the couple live together, that they have established a joint household, and that they share housework and joint responsibility for the care and support of their son in a manner consistent with a genuine relationship. I find that, at the material times, the nature of the household is indicative of a de facto and married relationship, as defined in the Act.

Social aspects of the relationship

37. The couple and the sponsor's brother provided consistent oral testimony about the couple's joint social activities. There is also compelling evidence before the Tribunal regarding the social aspects of their relationship, including: screenshots of text message between the sponsor and his mother about the couple's engagement; screenshots of social media posts; photos of the couple alone and with the sponsor's family; signed statements from the sponsor's parents, the sponsor's aunt and uncle and the sponsor's sister; and unsigned statements from the sponsor's uncle, the sponsor's brother and a friend and former landlord of the couple. I also viewed the applicant, the sponsor's, and the sponsor's mother's Facebook accounts, which include posts and photographs of the couple, their son and their family and friends engaging in social activities over the course of their relationship.
38. Having regard to this evidence, I find that, at the material times, the couple represent themselves to other people as being in a married relationship, that the couple's family, friends and acquaintances believe the relationship between the couple to be genuine and continuing, and that the couple plan and undertake joint social activities. Accordingly, I find that, at the material times, the social aspects of the relationship are consistent with a de facto and married relationship, as defined in the Act.

Nature of persons' commitment to each other

39. The couple had been in a relationship for approximately three years when the visa application was made and now, for approximately eight years. They have lived together for the majority of their relationship.
40. They provided oral evidence detailing how they support each other and the importance of their relationship to each other, including about the sponsor's mental health, the applicant's studies, and financial support provided to the applicant's family in Indonesia. They also provided consistent oral evidence about their future plans, including their intention to celebrate their wedding and their son's blessing in Indonesia.
41. I accept this evidence and find that the couple draws companionship and emotional support from each other commensurate with a genuine relationship and that they see the relationship

as long term. I find that, at the material times, the nature of the commitment is indicative of a de facto and married relationship, as defined in the Act.

42. Conclusion

43. Having regard to the findings set out above, I am satisfied that, at the time of application, the couple had a mutual commitment to a shared life to the exclusion of all others, that the relationship was genuine and continuing and that the couple lived together or did not live separately and apart on a permanent basis for the purposes of s 5CB(2)(a) to (c) of the Act. In the absence of any evidence, I am also satisfied that the couple is not related by family for the purposes of s 5CB(2)(d) of the Act. Accordingly, I find that the requirements of s 5CB(2) were met and that at the time of application, the couple were in a de facto relationship as defined in the Act.
44. I am also satisfied that, at the time of decision, the couple have a mutual commitment to a shared life as a married couple to the exclusion of all others, that the relationship is genuine and continuing, and that the couple live together or do not live separately and apart on a permanent basis for the purposes of s 5F(2)(b) to (d) of the Act. Accordingly, I find that the requirements of s 5F(2) are met and that at the time of my decision, the couple are in a married relationship, as defined in the Act.
45. Therefore, the applicant meets cl 820.211(2)(a) as the applicant was, at the material times, the spouse or de facto of the sponsor, who was an Australian permanent resident and now Australian citizen.

46. Are the other visa criteria met?

47. As the primary issues have been resolved in the applicant's favour, it is incumbent on the Tribunal to consider whether the applicant met the other requirements of cl 820.211(2) at the time of application, and whether the applicant continues to meet those requirements at the time of this decision, in accordance with cl 820.211(1)(a).
48. For the following reasons, the Tribunal is satisfied that these requirements are met.
49. Clause 820.211(2)(c)(i) of Schedule 2 to the Regulations requires that, if the applicant's spouse has turned 18, the applicant is sponsored by the spouse of the de facto partner. Reg 1.20 relevantly provides that the 'sponsor' of an applicant is a person who provides an undertaking to assist the applicant, to the extent necessary, financially and in relation to accommodation during the period of 2 years immediately following the grant of the temporary visa.
50. There is evidence before the Tribunal that the sponsor completed the department's online Form 40SP – Sponsorship for a partner to migrate to Australia, which included the relevant undertaking, on or about 26 February 2019. There is no evidence before the Tribunal that the sponsor has withdrawn their sponsorship. Accordingly, I am satisfied that at the material times, the applicant was and is sponsored by their spouse in accordance with cl 820.211(2)(c) of Schedule 2 to the Regulations.
51. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

52.

DECISION

53. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211(2) of Schedule 2 to the Regulations
 - cl 820. 221(1)(a) of Schedule 2 to the Regulations
 - reg 2.03A

Tegen Downes
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).